Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

(3)

No. 96-356

In the Supreme Court of the United States

OCTOBER TERM, 1996

MOFFITT, ZWERLING & KEMLER, P.C.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

WILLIAM B. MOFFITT
JOHN K. ZWERLING
LISA B. KEMLER
Of Counsel

ARTHUR F. MATHEWS
Counsel of Record
STEVEN P. FINIZIO
DAVID G. GRAY
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for Petitioner

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SUMMARY OF ARGUMENT

Petitioner, Moffitt, Zwerling & Kemler, P.C. ("MZK"), hereby replies to the government's brief in opposition ("Opp.").

1. The government's Opposition contains several material inaccuracies of fact. We correct those herein.

2. MZK's petition demonstrated the fundamental conflict between the Fourth Circuit's holding, allowing the government unilaterally to add attorney fee forfeiture to a case through use of a bill of particulars subject to no neutral review, and decisions of other Circuits, requiring a probable cause determination that a fee asset is subject to forfeiture before a criminal defendant may be prevented from using such an asset to retain counsel. The government makes no effort to reconcile that split.

3. The government's assertion that petitioner may lack standing to raise violations of the Fifth and Sixth Amendments is flatly refuted by this Court's standing analysis in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

4. MZK's petition explained that the Fourth Circuit's preemption analysis should be reviewed because it turns the rationale of *United States v. Texas*, 507 U.S. 529 (1993), on its head by subjecting third parties to a common law action that is more onerous than both the federal statutory scheme it is predicated on and the common law as it existed when that statute was enacted. The government's Opposition ignores the fact that the

government has no conversion cause of action independent of the Comprehensive Forfeiture Act of 1984 ("CFA").

5. MZK's petition showed why the Fourth Circuit's endorsement of a common law conversion action based on the federal relation-back fiction is inconsistent with the understanding of that fiction found in this Court's cases, as well as decisions of other Circuits. The government's attempt to dismiss this issue as one of state law is plainly wrong.

ARGUMENT

1.a. The government at several points misstates the record below. The most troubling such instance is the government's repeated statement that this petitioner "discouraged" its client from pleading guilty "on the ground that such a plea would place petitioner's acceptance of the fee in an unfavorable light." *See* Opp. 4, 11. There was no finding below that the law firm's "desire to protect its fee was overriding its obligation to represent its client" or that it "had placed itself in a position of square antagonism to the client's interests." *See id.* at 11.

As the record reflects, the defendant wanted the law firm to continue as his counsel, but the district court disqualified the law firm because it concluded that "no such waiver could be accepted because a potential or actual conflict exists that cannot be waived." Pet. App. 166a. The court did identify one of the disqualifying conflicts as the "statements allegedly made by the defendant." Tr., Hearing, Aug. 12, 1992, at 5-6. But the court explained that the disqualification was "not a conclusion that I reach with any imputation of any wrongdoing on the part of the law firm. That's not a matter before the Court, and I don't address that." *Id.* at 8. Noting that "some of the activities of the government . . . led to this," *id.*, the court also stated that "another important [conflict] grows out of the government's intention to use evidence concerning the legal fee paid by this defendant to the law firm." *Id.* at 5-6.[1/]

[1/] Not only was there no finding of wrongdoing by the district court, but the allegation was not made in open court and was not subject to cross-examination. In fact, the district court refused to allow petitioner to cross-examine the defendant on this allegation at the forfeiture hearing because the court ruled that it was not relevant to the forfeiture issues. Tr., Hearing, July 8, 1993, at 68-70. Nor was the allegation uncontradicted: the MZK partner

The alleged conversation, in any event, bears no arguable relevance to the issues raised by this petition. It took place almost a year after the firm's acceptance of its fee and allegedly involved a lawyer not present when the fee was accepted. Indeed, the only thing demonstrated by the disqualification is the inevitability of the conflict engendered by the government's use of a bill of particulars to add the law firm's fee to the forfeiture count of the superseding indictment.

b. Also misstated are the government's repeated suggestions that MZK accepted its fee *knowing* it was subject to forfeiture.[2/] There was no such finding below. The district court found:

> There wasn't any wrongdoing [by MZK]. These were not lawyers who deliberately did something knowing they were doing something wrong. That isn't this case. These are distinguished lawyers of this bar. This is an unclear area of the law, and while they didn't win this issue, they committed absolutely no wrongdoing.

Tr., Hearing, March 18, 1994, at 20. The court further found that, "[a]lthough the law firm could not prove by a preponderance that it qualified for § 853's bona fide purchaser protection, *there are no facts indicating [MZK] had actual notice or knowledge that the $103,800 was subject to forfeiture.*" Pet. App. 83a n.40 (emphasis added). The government ignores this in its effort to emphasize that MZK received a large sum of cash from a later-convicted drug dealer. This was a "mixed asset" case, however, which means that the defendant had assets that were not subject to forfeiture. Moreover, the defendant 1) operated two businesses (including a towing business that dealt in cash); 2) had a history of possessing large amounts of apparently untainted cash from before the time he started dealing drugs; and 3) told the law firm partners that for personal reasons he pre-

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allegedly involved in the conversation submitted a sworn affidavit directly controverting the allegation.

[2/] The government quotes the Fourth Circuit as stating that the law firm "engag[ed] in *** a wink and nod ritual." Opp. 3. The court actually said that it thought the meetings between the law firm and its client "create the impression" of such a ritual. Pet. App. 9a. This is a subtle difference, but an important one, given the district court's findings that MZK committed no wrongdoing and that there was no evidence MZK knew the fee was tainted.

ferred to retain his income as cash. The courts below concluded that these lawyers did not carry the burden of proving that their subjective belief was objectively reasonable. But MZK committed no wrongdoing; rather, the firm for nearly a year vigorously and honorably defended its client.

2.a. The government does not directly rebut the constitutional arguments raised in MZK's petition. The constitutional proposition is straightforward: it is unconstitutional to prevent a criminal defendant from using property not yet adjudged forfeitable to retain counsel of his or her choice absent a neutral determination by a court or grand jury that there is probable cause to believe such property is subject to forfeiture. *Caplin* and *United States v. Monsanto*, 491 U.S. 600 (1989), are premised on such protection. *See, e.g., id.* at 615-16. Instead, the government, citing *Libretti v. United States*, -- U.S. --, 116 S. Ct. 356, 363 (1995), argues that no legal weight should be given this Court's statement in *Caplin* that "any assets which the Government wishes to have forfeited must be specified in the indictment." 491 U.S. at 632 n.10. There is nothing, however, in *Libretti* that is inconsistent with the acknowledgment in *Caplin* and *Monsanto* of some limited constitutional constraint against pretrial deprivation of a fee asset.

Other Courts of Appeals recognize the constitutional necessity of providing neutral probable cause scrutiny before depriving a criminal defendant of the right to use his or her property to retain counsel.[3/] Indeed, those courts go further and provide that a grand jury's probable cause determination can be reviewed at an adversarial hearing before a defendant can be prevented from using property not yet adjudged forfeitable to retain counsel. The Fourth Circuit's holding is fundamentally at odds with these precedents. The government fails to explain how these decisions can be reconciled.

b. Ignoring its earlier representations to the district court that the fee asset was not identified in the indictment, the government here contends that the fee asset was properly "pinpointed" through the use of a bill of particulars. The govern-

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3/ *See, e.g., United States v. Michelle's Lounge*, 39 F.3d 684, 691, 695 (7th Cir. 1994); *United States v. Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), *cert. denied*, 502 U.S. 943 (1991); *see also* Pet. 5 n.2.

ment's two arguments in support of its claim that the fee asset was "encompassed" by the forfeiture language of the indictments are not supported by the record.

The government first contends that the fee asset is encompassed by a general catchall provision in the indictment. This provision does not "encompass" the fee asset in any meaningful way. It does not constitute a probable cause determination that *all* of the defendant's property is subject to forfeiture or that *any* specific property is subject to forfeiture; and it certainly does not entail a probable cause determination that *the* property the defendant used or intends to use to retain counsel is subject to forfeiture. Rather, it is a tautology which simply restates the necessary fact that all forfeitable property is subject to forfeiture. *See* Pet. 18. In a mixed asset case such as this, where the government did not seize all of the defendant's property, and even returned to him some property, the inclusion of such a catchall provision provides neither neutral scrutiny justifying the pretrial deprivation of the defendant's right to use his property to retain counsel nor notice to third parties.

The second justification put forth by the government is a post-hoc invention that demonstrates the government's failure to take seriously the need for some neutral scrutiny of the nexus between the property and the criminal activity. The government claims that the fee asset was included in the indictments as item 5, "[a]ny and all interest of [the defendant] in $168,000 in United States currency." *See* Pet. App. 181a, 183a. This, however, was not the government's original position.

First, at a March 13, 1992 hearing, the government told the court that the fee asset was *not* the subject of any count in the indictment; it was *not* seeking criminal forfeiture of the fee; and it had just learned details of the fee and therefore could not have identified the fee asset to the grand jury. Pet. App. 186a- 87a. *Next*, on May 29, 1992, after the defendant and MZK moved to dissolve the restraining order because the fee was not part of the indictment, the government contradicted its prior statements to the court and argued that the fee actually was part of the catchall provision of the forfeiture count. *Finally*, on June 1, 1993, the government argued for the first time that the fee was in the indictment all along as part of item 5.

This most recent argument also is inconsistent with the way the fee is described in the bill of particulars -- as an *additional* asset to be *added* to the forfeiture count. The fee asset is listed as item 13 to the list of forfeitable assets that still listed the $168,000 as item 5. Moreover, it is inconsistent with the way the $168,000 was identified to the grand jury. The $168,000 is one of several cash items in the forfeiture count, *see* Pet. App. 181a, 183a, and consisted of assets other than the fee asset, specifically money spent by the defendant on alimony, entertainment, jewelry, and cars. *See id.* 189a-90a.

The government's inability to consistently identify where in the indictment the fee asset is identified belies any argument that the grand jury determined that there was probable cause to believe the fee was forfeitable. The plain fact is that the government's March 1992 statement to the court that the fee asset was not identified in the indictment was correct. The post-hoc rationalizations make a mockery of the notion of neutral scrutiny and cannot be reconciled with *Caplin*'s requirement that such an asset be specified in the indictment.

c. The government's assertion that "even assuming . . . that the cash transferred to petitioner was not encompassed within the forfeiture allegations of the indictment, petitioner had the benefit of an adversary hearing on the question of forfeitability in the district court," *see* Opp. 13, completely misses the point. The forfeiture hearing, which by statute cannot take place until after conviction, *see* 21 U.S.C. § 853(n)(1), was held on July 7 and 8, 1993, and the court's decision denying the petition was issued February 3, 1994 -- long after the indictment, the disqualification, the scheduled trial date, and the guilty plea. A post-conviction hearing provides no protection whatsoever against an erroneous pretrial deprivation of a criminal defendant's right to use his property to retain counsel and it does nothing to prevent the government from using a bill of particulars tactically to inject a disqualifying conflict into a case.[4/]

[4/] The contention that the government used fee forfeiture tactically here is not idle speculation. Two different district court judges observed that the government's conduct appeared calculated to drive the law firm out of the case. Judge Bryan stated

> It concerns me. And the perception, regardless of actual motives, the perception that arises from the timing of it is damning, it seems

d. Notwithstanding the government's arguments to the contrary, the prejudice caused by the use of the bill of particulars is manifest. The law firm was disqualified after nearly a year of legal services. Those services were by provided by MZK as a bona fide purchaser for value, Pet. App. 139a, and the fee expended in "in the ordinary course of business" well before the bill of particulars was filed. *Id.* at 24a. Had the indictments specified the fee asset, the firm at that time could have chosen whether to withdraw, to represent the defendant *pro bono*, or to seek alternative sources of payment before dedicating its time and resources to this matter.

The failure to specify the fee in the indictment also resulted in the fee asset, and counsel, becoming an issue in plea negotiations. The government made the defendant's cooperation in pursuing forfeiture from his former lawyers part of the plea bargain. His sentence was reduced in exchange for his "unstinting efforts" against his former counsel, his consent to forfeiture of the fee (after he had paid the fee to the firm), and his testimony at the forfeiture hearing that the fee assets were drug proceeds. He thus gained both the benefit of the MZK's legal services and a sentence reduction (from 262 to 60 months), rather than the additional punishment that is the rationale for criminal forfeiture. There are sensible alternatives to this unseemly spectacle. The government can specifically identify the fee asset in the indictment. If it cannot, or chooses not to do so, it retains the remedy of civil forfeiture.

3. The government's suggestion that the law firm may lack *jus tertii* standing to challenge the constitutionality of the use of the bill of particulars is difficult to fathom. Contrary to the government's assertion, the petition does not assert the defendant's rights under the Grand Jury Clause of the Fifth Amendment. The petition expressly asserts violations of the due process clause of the Fifth Amendment and the right to counsel

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> to me, to the United States Attorneys' Office. The idea that you threaten a lawyer with prosecution a few weeks before trial in which he is involved, it looks like, whatever you meant, that you are trying to drive that lawyer out of the case.

Tr., Hearing, March 13, 1992, at 47-48. Similarly, Judge Ellis observed that "[r]easonable people" could view the government's actions as an attempt to drive MZK out of this case. Pet. App. 211a.

clause of the Sixth Amendment, precisely the rights at issue in *Monsanto*, *Caplin*, and the decisions cited in n.3.

MZK stands in precisely the same position as did the petitioner in *Caplin* and, as in *Caplin*, raises claims cognizable regardless of the defendant's guilty plea and consent to the forfeiture order. *See* 491 U.S. at 621. *First*, the law firm suffered an injury-in-fact adequate to satisfy Article III's case-or-controversy requirement -- its stake in its fee. *Id.* at 624 n.3. *Second*, the law firm seeks to defend the attorney-client relationship, a relationship of "special consequence." *Id.* *Third*, the procedure employed by the government will materially impair the ability of similarly-situated third parties to exercise their constitutional rights. *Id.* The government's assertion that this case is different from *Caplin* because MZK "placed itself in a position of square antagonism to the client's interests," *see* Opp. 11, is both unfounded and unpersuasive. As discussed *supra*, there is no proper basis for that assertion. And, more importantly, as the district court recognized, the disqualification issue arose, at least in part, because *the government* added the fee to the case. Indeed, it is this disruption of the attorney-client relationship between the defendant and the law firm -- relied on by the government to argue against standing -- that forms the basis of this challenge.

4. The government blithely argues that the law firm's preemption claim does not merit review because MZK's "argument in this regard is circular, and reduces to the assertion that underlies the third question presented by the petition, *i.e.*, that Virginia law would not recognize a conversion claim under the circumstances of this case." Opp. 16. This argument ignores the hybrid nature of the conversion claim pursued by the government and misreads the substance of MZK's petition.

No conversion claim could have been asserted by the government under the facts of this case until the CFA incorporated the relation-back fiction into the criminal forfeiture framework. It simply cannot be contested that, without the relation-back fiction, the government would, prior to entry of the forfeiture order, hold no rights in property subsequently forfeited and thus *could not* under any state's law bring a conversion action to recover that property. Thus, no "longstanding" right to sue for

conversion *in this context* predated the passage of the CFA. Rather, the CFA itself created the potential for the hybrid action -- state law conversion plus statutory relation-back -- pursued here by the government. That hybrid, more expansive than either common law conversion or statutory criminal forfeiture, potentially subjects every third-party transferee to a suit by the government for damages -- despite the fact that the CFA expressly limits the power of the government to recover damages from third parties.

The Fourth Circuit's erroneous application of *Texas* disregarded the preemption standards set forth by this Court in *English v. General Elec. Co.*, 496 U.S. 72 (1990), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The Fourth Circuit likewise relied upon an interpretation of 21 U.S.C. § 903 that conflicts with precedents of the Third, Fifth, and Eleventh Circuits. *See* Pet. at 24 & n.3. Review to resolve the conflict between the federal statutory scheme and the state law claim based upon that scheme is therefore appropriate.

5. The Fourth Circuit's holding that a state law tort claim can be founded retroactively on a federal forfeiture order works a massive rewriting of federal forfeiture law, particularly with respect to third-party transferees, but the government nonetheless dismisses the Fourth Circuit's decision as nothing more than an interpretation of state law. Virginia's law of conversion is not novel: a necessary predicate to a common law conversion claim is the plaintiff's right to immediate possession of the property at the time the property is obtained or used by the defendant. The operative question in this case is purely one of federal law -- does the federal relation-back fiction codified in the CFA retroactively create a right to immediate possession. In *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993), and *United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337 (1806), this Court made clear that the relation-back fiction does not vest all rights of ownership in the government at the moment of the illegal act. Until the forfeiture order enters, the government does not own the property. Upon entry of the order, title then relates back to ensure that the government receives title unencumbered from the time of the illegal act. The idea, however, that the relation-back fiction can create retroactively *in personam* tort liability is utterly novel and is incon-

sistent with the understanding of relation-back set forth in *Buena Vista* and *Grundy*, as well as decisions such as *Counihan v. Allstate Ins. Co.*, 25 F.3d 109 (2d Cir. 1994).

The government's further assertion that the two-day evidentiary hearing on the law firm's § 853(n) petition somehow justifies the imposition of tort liability simply makes no sense. That hearing established only that the law firm could not carry the burden of showing it was reasonably without cause to believe the fee asset was subject to forfeiture, nothing more. The law firm's failure to prevail in its § 853(n) petition in no way demonstrates that *the government* has the requisite possessory interest to state a conversion claim.

In its effort to distinguish this case from those cited in the petition, like *CHoPP Computer Corp. v. United States*, 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, -- U.S. --, 115 S. Ct. 63 (1994), the government assumes the existence of a never before recognized cause of action, a hybrid "criminal-forfeiture-conversion" claim. This new cause of action is indeed convenient for the government for it allows it to have it both ways. Normal notions of tort liability do not apply because such notions have "scant relevance to criminal forfeiture under federal narcotics laws." *See* Opp. 18. At the same time, the express limitations of federal criminal forfeiture law (such as Congress's deliberate omission of a substitute asset remedy against third parties) can be disregarded because this is nothing more than a state law conversion action. The government's theory is illogical and unprecedented; it creates a strict liability tort that can be used against third parties that goes far beyond any remedy created by the criminal forfeiture statute on which it is based; it is inconsistent with this Court's precedent and that of other Circuits; and, accordingly, it should be reviewed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

WILLIAM B. MOFFITT
JOHN K. ZWERLING
LISA B. KEMLER
Of Counsel

ARTHUR F. MATHEWS
Counsel of Record
STEVEN P. FINIZIO
DAVID G. GRAY
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for Petitioner